United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1210

B
P/S

To be argued by

LAWRENCE H. LEVNER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 761210

UNITED STATES OF AMERICA,

Appellee,

-v.-

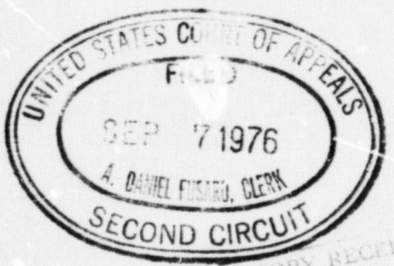
CHARLES RAMSEY,

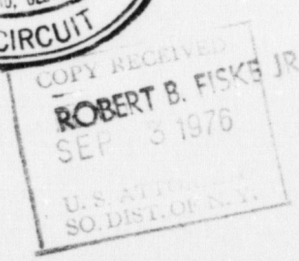
Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF





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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York, rendered on April 2nd, 1976, after a trial by jury, convicting the appellant CHARLES RAMSEY of a narcotic conspiracy, Count 1, dealing in the sale of heroin during the period of January 1, 1969 up to and continuously thereafter including December 6, 1973. The defendant was sentenced on June 18th to a term of imprisonment of fifteen years followed by special parole for a period of three years.

STATEMENT OF FACTS

The original indictment, under which this defendant-appellant was tried and convicted, charged one conspiracy count and thirteen (13) substantive counts.

The original indictment charged seventeen defendants with actively engaging in the narcotic conspiracy alleged in Count 1. The government's Bill of Particulars alleged that there were approximately fifty-four unindicted co-conspirators in addition to those named in the indictment.

The defendant-appellant CHARLES RAMSEY was named only in Count 1, the narcotic conspiracy charge, and it is alleged that he violated Sections 173, 174, 812, 141(a)(1) and 841(b)(1)(A) of Title 21 of the United States Code and Title 21,

United States Code, Section 846.

The first count of the indictment dealing with the conspiracy count alletes 37 overt acts that the defendants were alleged to have been involved in during the period of the conspiracy, running from January 1, 1969 up to and including December 6, 1973.

The defendant-appellant CHARLES RAMSEY was named in Count 1 and listed in the overt acts numbered 15 and 21.

Overt Act 15 alleges that, in or about October, 1971, the defendant CHARLES RAMSEY received approximately 1 kilogram of heroin from co-conspirator Warren Robinson in Silver Springs, Maryland.

Overt Act 21 alleges that, in or about February, 1972, the defendant CHARLES RAMSEY delivered approximately 1 1/2 ounces of heroin to the defendant JAMES MARCH, a/k/a "Bubbles" at the Slack Bar, Georgia Avenue, N.W., Washington, D.C.

TESTIMONY FOR GOVERNMENT

The government based its case against defendant-appellant CHARLES RAMSEY solely upon the testimony of three paid government informatns. They were: Thomas Frank Dawson, a/k/a Tennessee Dawson, an unindicted co-conspirator, James March, a/k/a "Bubbles" and Dorothea Ann Ellis, a/k/a Dorothea Lane, indicted co-conspirators.

Tennessee Frank Dawson, the first witness called by the

government, testified that he was 46 years of age and was the owner of a small country grovery store in Memphis, Tennessee. He has spent a total of 14 years in various state institutions after three pleas of guilt to house breaking and is presently awaiting sentence after pleading guilty, in the United States District Court for the Southern District, to a narcotic conspiracy charge. He faces a fifteen year maximum sentence. [J 189-190].

He has been a paid government informant since the latter part of 1971, receiving expense money and rewards for certain information communicated to various government agencies. [J 194].

While working as a government informant and cooperating with government, he was involved in at least three illicit narcotic transactions without the knowledge and consent of the United States Government. In 1969 he acted as a government agent and received a substantial reward of $2,000 for information he gave to the United States Government in relation to a post office robbery. [J 198-199].

Dawson also admitted that he cracked as many safes as he could. His success in this field of crime was so great that he can no longer remember even the approximate number of times he succeeded in opening the safes. [J 193].

With respect to the accusation in this case, Tennessee

* The reproduced appendix of the appellant herein is cited infra using the prefix " J ".

They were able to see what was going on in the living room. [J 222]. Both March and Dawson were able to peek out of the door and see what was going on. Dawson saw RAMSEY enter the apartment. In fact, he said that he saw him enter and leave, not through any reflection or any mirror, but directly through the small crack in the door. [J 222]. He saw that RAMSEY was carrying a bag when he left but he doesn't know what was in it. He and March never left the bedroom. Dawson is absolutely certain that they never left the bedroom. [J223-224].

Dawson again reiterated that at no time did he leave the bedroom. [J 219].

This is the only testimony of Tennessee Dawson about any narcotic transaction CHARLES RAMSEY, the appellant, may have been involved in.

BUBBLES MARCH

Bubbles March testified for the government in a manner tending to support Dawson's fabrications as to what occurred in Warren Robinson's apartment in Silver Springs, Maryland in the Fall of 1971. He stated that he heard a knock on the door. Robinson asked them to go into the bedroom. The door to the bedroom was open enabling March to hear RAMSEY's voice. RAMSEY was telling Warren Robinson that he was expecting more narcotics for the money that he had fronted. The door was slightly open so they were able to hear the conversation. He and Dawson came

out of the bedroom seconds after RAMSEY left. March did not see the defendant-appellant CHARLES RAMSEY take anything out of the apartment. [J 238].

March also testified that RAMSEY brought him an ounce and one-half of scramble narcotics in 197[illegible] or 1972 (scramble narcotics are highly cut, poor quality narcotics). [TR 926-7]*.

The cross-examination of Bubbles March highlighted the fact that March had been to that apartment more than ten times prior to that incident. [J 245].

He testified that on the night in question that he, Tennessee Dawson and Warren Robinson, drove up a ramp to Warren's apartment on the tenth floor as they had done on several other occasions. They parked the car outside the door of the apartment and went into the apartment. Defense counsel again asked him, are you absolutely sure you can drive up a ramp to the apartment? The witness testified, yes, we did it several times before. Defense counsel again stated, but if someone told you there was no ramp going up to the tenth floor, they would be mistaken wouldn't they? March testified that to the best of his recollection he drove up to the tenth floor, and yes, anybody who said otherwise would be mistaken. [J247-48].

LYNN EVERNGAM

The government next called Lynn Everngam as its witness to establish the ownership of the apartment where this transaction

* The Trial transcript of the appellant herein is cited infra using the prefix "TR".

is alleged to have taken place. Lynn Everngam testified she had been the resident manager for approxi[illegible]ly three years, since October of 1972; that she was fa[illegible]liar with the layout of the apartment in question; and that it was a one bedroom apartment leased to the severed defendant Warren Robinson. [J 249-50].

Cross-examination of Lynn Everngam brought out the fact that there was no ramp to any of the apartments, that it is impossible to park a car outside of the apartment or in fact, any apartment in that building, since no ramp leads to the apartment area. It was further brought out from her recollection and the diagram, Exhibiy 31 [J-251] that the floor plan of this apartment makes it physically impossible for anyone to look out into the living room from the bedroom, as the doorway of the bedroom opens into a little alcove which faces a closet and bathroom; that it would be physically impossible to see any portion of the living room or kitchen or doorway of that apartment from the bedroom.

Both Bubbles March and Tennessee Dawson were mistaken when they testified they saw CHARLES RAMSEY enter the apartment. Their testimony was incredible when they testified that they had, on a number of occasions, driven up a ramp to the tenth floor and parked their car outside the tenth floor apartment. This witness identified RAMSEY's exhibit (Exhibit 31, J 251)

which was a layout of the apartment in question and stated it was physically impossible for anyone to have seen someone enter or leave that apartment under the given circumstances. [J 252-58].

ANN ELLIS testified that she had been present with James Kelly, an unindicted co-conspirator, and CHARLES RAMSEY, as well as her daughter, and her niece, Christine Green, when they drove to New York to see if they could locate her narcotic connection. This trip proved fruitless. Shortly thereafter, they made a second trip to New York looking for her former boyfriend's previous connection, one Georgie; once again they were unsuccessful. Cross-examination indicated that the witness, Dorothea Ellis, had testified in another proceeding, in the United States District Court of Maryland, that she gave testimony under oath, and that she admitted upon cross-examination that she had lied on at least four occasions as to a very substantial portion of her testimony [J 281]. She is an admitted perjurer and is presently in the employ of the United States Government as an informer, as are James March and Tennessee Dawson [J 260-62].

The government would not give the address of this witness nor that of her parents, due to alleged death threats. Without Ellis' address there was no way to contact her or get Christine Green's address [J 260-62].

No further testimony regarding CHARLES RAMSEY was adduced

in the proceeding which terminated after some eleven weeks.

JUDGE'S PRIVATE CONVERSATIONS WITH JURORS DURING DELIBERATIONS

On March 31, 1976, during the jury's deliberations, the Court held a number of private conversations with juror number 3, Mr. Allen. When the jury was selected, this juror had indicated to the Court that he had a medical appointment in mid-March. He was assured, by the Court, that the trial would not interfere with this appointment [J 179]. On March 31, the Court refused to hear defense counsel's applications to be heard on the matter of those conversations [J 180-86].

The applications were renewed on the morning of April 1. The Court refused to inform defense counsel and the prosecution of the substance of these conversations. [J 180-86]. However, on motion of the government, the Court agreed to make a sealed record of the conversations [J 186-87].

Subsequently, on April 1, the Court had another private conversation with a juror, number 9, Mrs. Moses. The Court informed defense counsel and the government of the substance of that conversation. Exceptions were taken. [J 188].

During jury selection on or about January 29, 1976 prospective juror #3, Mr. Allen, requested of the Court the length of time that he might have to serve as a juror on the within case. The judge at that time placed an outside limit of

seven weeks on his services and the prospective juror, Mr. Allen, volunteered the fact that he had a medical appointment six weeks from last Monday at 2:30 in the afternoon. The Court stated that they would take care of it and that the juror need not worry about it, [J/179].

On April 1, 1976 at about 9:30 in the morning the jury resumed deliberation after having received the Court's charge. Several notes were received from the jury, all of them were marked as court's exhibits. When one of the attorneys stated some concern on behalf of her client with regard to Juror 3, Mr. Allen, counsel stated that on several occasions she had noticed Juror 3 speaking to the Judge and sought an explanation of these conversations. The Court at that time refused, in fact absolutely refused, to discuss those conversations in open court with any of the defendants or counsel [J/180-86].

The Court felt that certain things were totally personal and that the Court had no desire at this time or at any time in the future to put it on the record or any place else.

Counsel continued his objection and the Court volunteered that that juror 3, Mr. Allen, had a total of two conversations with the Judge outside the presence of defense counsel and of the defendants. The Court being pressed, again stated that the conversations are purely of a personal nature and have nothing

absolutely to do with deliberations.

The Assistant United States Attorney, Mr. Thomas Engel, stated on the record that that juror, Mr. Allen, went into the jury room on two occasions, perhaps three, left the jury box and went up to Your Honor and spent perhaps fifteen or thirty seconds talking to Your Honor and left and Your Honor's statements indicate today whatever Mr. Allen said had nothing to do with any time impingement or any problem as to the length of deliberations [J 180-86]. Defense counsel again suggested along with the government that the better practice at this juncture would be to put those conversations on the record and seal it, which the Court then did.

What was recorded was done so outside the presence of the defendants, their attorneys and the government's attorneys. What was recorded was done unilaterally outside the presence of the juror who had the conversations with the Court, [J 187].

MANACLED DEFENDANTS

The defendants having been viewed by said jurors on two or three occasions in manacles provoked defense counsel to move for a mistrial on behalf of the defendant-appellant CHARLES RAMSEY [J 304-05]. Said application was joined in by numerous other defense counsel. It was determined that only four jurors were involved in the last viewing of the manacles defendants. [J 305].

The government opposed the motion for a mistrial and suggested that it, the Assistant United States Attorney, make further inquiry of the Marshals and report same to the Court, [J 308-11].

The United States government alletedly after questioning the Marshals who were present when the jurors saw the defendants, stated the events to the Court leading up to the jurors' viewing of said defendants. The Assistant United States Attorney, in addition, interviewed a Magistrate Raby with respect to what he saw since he was present in the general area where the jurors allegedly saw the manacles defendants [J 308-11]. The Assistant United States Attorney further ordered that when questioning the Magistrate, he said he saw nothing unusual and denied seeing anything else or anybody else at that time and place [J 309-11]. The government continued in its argument stating that it is extremely doubtful that these defendants were seen and that there was no need for a hearing on these events [J 310-311].

A defendant who was present in the robing room during the course of these conversations, Dog Turner, stated while being taken from the MCC to the Courtroom and waiting for an elevator, the elevator doors opened and we could see all the jurors very plainly and very clearly. The defendants RAMSEY and Taylor were definitely right in visible view. [J 312-315].

Defendant Turner added "they were all shocked, the expression on their face. They looked just as shocked as we were to see them." [J 312-15].

The Court further advised during this discussion in the robing room, that it was not the second but rather the third occasion the jurors had viewed certain of the defendants, namely RAMSEY, Turner, Hansen and Taylor. [J 314-15]. The government offered up a number of explanations as to why the defendants were being seen by the jurors and that it was no fault of the Marshals in bringing them to the courtroom in a particular manner or by way of a particular route. [J 310-11]. The Court questioned the Court Clerk, Mr. Dilberian, requesting of him whether or not he had pointed out that elevator in which the defendants were being hurried from the MCC to the courtroom as being off limits to the jury. Defense counsel asked the Court Officer, Mr. Dilberian, if he had told the jurors they were not supposed to use that elevator. The Clerk answered no. [J 316]. The Court refuses to request a hearing of those jurors who viewed the defendants and relied erroneously upon United States v. Bentvena [J 317].

CHRISTINE GREEN

The Court informed the defendants on Friday, March 12, 1976, that if none of their witnesses appeared on Monday, they would be made to rest their cases. The prosecutor then told

the Court that the appellant had asked for Christine Green the previous day. The prosecutor asserted that he did not know where she was. Furthermore, the telephone of her cousin, Miss Ellis, had been delisted and he did not know where to find her. He had forgotten to ask Miss Ellis for Christine Green's address when she called the evening before, but as she was supposed to call him that afternoon, he hoped to get the information. [J 320-24].

On Monday morning the Court was informed that Miss Green had failed to appear at the prosecutor's office at 9:45 as she had promised to do. [J 321-28]. The prosecutor told the Court that he had been able to get her number and had spoken with her mother. "...when I spoke to Mrs. Green I told her I am not subpoening her, I can't force her to attend unless I subpoena her, and I told her unless she is subpoenaed, it is her right not to appear, but I told her I would like her to appear, and she said she would." [J 332].

In response to the Court's inquiry, appellant's counsel explained that he had known of an individual named Christine for three weeks but that he had not learned her last name until Thursday, March 18th. Nor had the appellant been given her address or telephone number; these were supplied to the appellant only at 2 P.M. of that day. [J 333]. The

appellant's counsel explained that Miss Green had not been called earlier because her possible testimony had been subject to the connection of one Kelly, whom the government had been asked to produce from custody during the third week of the trial. Kelly had only been produced that morning, March 22, at 9:30 [J 332-335].

The appellant himself asked the Court for an opportunity to put on his witness in order that he might prove his innocence. The Court told him that there was nothing more it could do [J 326-28].

Christine Green having not appeared, appellant's counsel informed the Court, prior to summation, that he was prepared to produce an investigator who would testify that he had kept Miss Green's apartment under surveillance for the past two days and that the apartment had been empty for that time. The Court denied the appellant's request for a charge to the jury on this matter [J 336].

POINT I

THE APPELLANT, CHARLES RAMSEY, WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

A. THE TRIAL COURT ALLOWED TAINTED TESTIMONY TO BE INTRODUCED AGAINST THE APPELLANT.

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony."

Mesarosh v. United States, 352 U.S. 10, FF S.Ct. 1, 5 (1956).

At the trial, it was alleged that the appellant had participated in two narcotics transactions. The testimony summarized and analyzed infra, (see following detailed inserts pages 17 A,B,C,D), was all the proof that the government offered to support its contention that CHARLES RAMSEY had purchased a kilo of heroin from Warren Robinson.

"ithin the context of an eleven week conspiracy trial involving 54 named co-conspirators, of whom eleven were on trial, it cannot be said that the jury was not influenced by such obviously tainted or collaborated testimony. Nor can it be said with certainty that the jury analyzed this testimony, became aware of its highly improbable character and yet based its verdict solely upon the untainted testimony relating to RAMSEY's other actions. A "new trial is required if the false testimony could...in any reasonable likelihood have affected the judgment of the jury..."Giglio v. United States, 405 U.S.150, 154, 92 S.Ct. F63, F66, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S.264, 271, F9 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959).

DAWSON

Has visited apartment 1022 fifteen times, spending a great deal of time there during 1971 and 1972. (Tr. 426)

Drove up on the ramp to Warren Robinson's apartment. (Tr.246)

A

Has been in the apartment more than 10 times (Tr. 1276)

A - I've driven up a ramp to the tenth floor apartment on several occasions.

Q - Are you absolutely certain of that?

A - Yes, I am.

Q - Were you under the influence of any narcotic or were you hallucinating?

A - No, I wasn't.

(Tr. 1277)

Q - How many occasions did you take the ramp up to the tenth floor?

A - I don't know. Several occasions.

Q - More than twice?

A - Yes, I did.

Q - I see. If somebody told you there was no ramp going up to the tenth floor, they would be mistaken, is that correct?

A - To the best of my recollection, we drove up to the tenth floor, got out, walked through a door and went to his apartment.

Q - If I were to tell you that there is no ramp to the tenth floor, I would be mistaken?

A - To the best of my recollection you would be.

Q - You are testifying under oath and you are testifying truthfully?

A - To the best of my ability.

(Tr. 1278-1279)

EVERNGAM

Resident Manager of Twin Towers apartment building, Silver Springs, Maryland for three years. (Tr.1335)

There is no ramp leading to the tenth floor. The parking garage is on the third floor. The only way from that to the tenth floor is by elevator or by the staircase. (Tr. 1349)

There was a knock on the door and Warren told Bubbles and me to go into the bedroom (Tr. 246).

We went into the bedroom and left the door open a little bit. Ramsey had not yet entered the apartment and we remained in the bedroom until he had left. (Tr.421).

We had the door open so we could see what was going on. No question about that (Tr. 428).

While in the bedroom, I saw Ramsey leave the apartment carrying a brown paper bag. (Tr.247; Tr. 431)

The Court questioned Dawson:

Q - Could you see out through the bedroom door?

A - Not the full--I couldn't see the full living room, no sir.

Q - Could you see part of it?

A - Yes, sir.

(Tr. 431)

Q - Then Mr. Ramsey left; there is no question in your mind about that?

A - That's true.

Q - And there is no question that Mr. March was also in the bedroom and he observed the same things you did?

We went into the bedroom, the door was open and I heard Warren and Ramsey talk. (Tr. 911)

The door to the bedroom was slightly open. (Tr. 913).

The Court questioned March:
Q - Did you see Ramsey take anything out of the apartment?

A - No, I did not.

(Tr.)

EVERNGAM

Identifies government Exhibit 31 as fairly and accurately portraying the physical layout of Apartment 1022 in or about the summer of 1972. (Tr. 1355)

A person in the bedroom of Apartment 1022, looking out, with the door open, would only see the bathroom and the linen closet, and his view would be limited to the left side of the apartment. (Tr. 1357).

A person in the bedroom of Apartment 1022 could not see another person leave the apartment because the door of the bedroom opens in such a manner that all he would be able to see would be the bathroom and the hall closet.

(Tr. 1357)

A. I can't speak for Mr. March.

Q - Might you say that Mr. March was in your presence during that period of time?

A - Yes, sir.

Q - He didn't go outside the bedroom?

A - No, sir.

Q - He didn't introduce himself to Ramsey?

A - No, sir.

Q - You didn't go outside the bedroom?

A - No, sir.

Q - Are you sure?

A - I'm sure.

Q - Absolutely certain?

A - That I didn't go out of the bedroom while Ramsey was there?

Q - Yes sir.

A - No, sir, I did not.

Q - This is so important to my client. Please think before you answer.

THE COURT: Allright.Come on.

Q - At no time did you leave that bedroom---

A - No sir.

Q - --while Mr. Ramsey was there?

A.- No, sir.

Q - That is your testimony today?

A - Yes, sir.

(Tr. 432) .

C

DAWSON

I saw Ramsey directly from the bedroom, through no reflection, mirror, or anything like that. I actually saw him.

(Tr. 431)

Does not recall when the transaction occurred, the apartment number, the floor the apartment was on, and does not recall the address.

(Tr. 436)

I heard Warren and Ramsey argue because Ramsey owed $9000 and he didn't have it with him. (Tr. 247)

D

Ramsey was telling Warren that he was expecting more narcotics for the money he had fronted and Warren was telling him that was all the narcotics he had.

(Tr 912)

Given the voluminous testimony of criminal activity, which was unrelated to the acts of the appellant, presented at the trial, the repeated viewings of the appellant in manacles by jurors (infra), and the appellant's inability to call a witness because of prosecutorial misconduct (infra), the admission of such tainted testimony denied the appellant his Sixth Amendment right to a fair trial. The appellant should be afforded a new trial at which the jury can decide upon his guilt or innocence without the prejudice of tainted testimony.

In the event that, at a new trial, the government is unable to prove the alleged Robinson transaction with untainted testimony, the appellant RAMSEY should benefit from the "single act" line of cases. In view of the relatively minute amount of narcotics involved, 1 1/2 ounces of scramble heroin, RAMSEY should not be presumed to have knowledge of this or any wider conspiracy.

This Court stated in United States v. Traumunti, 513 F.2d 1087 [2d Cir., 1975],

> ". . .a single act may be sufficient for an inference of involvement in a criminal enterprise of substantial scope, at least if the act is of a nature to justify inference of knowledge of the broader conspiracy" at 1111. [Emphasis added].

In Traumunti, supra, the Court found that Alonzo Ware, who purchased 2 ounces of conspiracy heroin, saying that "he wanted to get rolling again and wanted to start off small," supra,

at 1112, was entitled to the benefit from the single act line of cases. Here the converse may be true. RAMSEY did not purchase narcotics but rather sold narcotics to March, who subsequently used it himself.

Within the context of this conspiracy, if it can be shown that RAMSEY sold 1 1/2 ounces of scramble narcotics on one single occasion to Bubbles March, then he should not be presumed to have known, by reason of this sale, to have known of the conspiracy in which March may have been involved, nor to have joined that conspiracy or made its objectives his own.

B. THE PROSECUTION BY REFUSING TO PRODUCE A POTENTIAL WITNESS AND REVEAL WHERE THIS WITNESS COULD BE FOUND DEPRIVED THE APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

In Washington v. The State of Texas, 388 U.S. 20, 87 S.Ct. 1920 [1967] the Supreme Court stated that:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as the accused has the right to confront the prosecution witnesses for the purpose of challenging their testimony, he has the right to present his own witness to establish a defense. This right is a fundamental element of due process of the law."

Washington, supra, at 1923.

As stated in Farelta v. California, 422 U.S. 806 [1975],

"the rights to notice, confrontation and compulsory process when taken together, guarantee that a criminal charge may be answered in the manner now considered fundamental to the fair administration of American justice--through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." at 818.

In the instant case, the appellant sought to interview Christine Green who, it is alleted, had been part of a group which accompanied the appellant RAMSEY and Anne Ellis to New York in search of a former narcotics connection of Ellis'. The appellant's efforts to obtain Miss Green's full name, address and telephone number from the government, as well as the government's conduct in this matter, have been detailed above, supra.

A somewhat similar situation arose in United States v. Mosca, 475 F.2d 1052 [2d Cir. 1973] where the defendant was unable to compel the presence of a witness then in England, as part of a government witness protection program. This Court followed a "two dimensional approach, in which the requisite showing of prejudice will vary adversely to the gravity of the (prosecutorial) misconduct" at 1059, in determining whether a new trial was necessary. Citing United States v. Mayersohn,

452 F.2d 521, 526, this Court said "the more egregious the suppression, the less material to the verdict may be the evidence suppressed to justify a new trial. Where the suppression is deliberate, the interest of enforcing the second principal become paramount."

An analogy can also be drawn to the cases where the prosecutor has deliberately suppressed evidence favorable to the defendant. In United States v. Seijo, 514 F.2d 1357 [2d Cir. 1975], this Court granted a new trial where the prosecution had failed to inform defendant, after a specific request, of a key witness' prior criminal record. Similarly in Grant v. Alldredge, 498 F.2d 376 [2d Cir, 1974] a new trial was ordered where the government failed to respond fully to a pretrial request to disclose evidence favorable to the defendant, and thereby prevented the defendant from investigating facts which could well have been entirely exculpatory. See also, United States v. Kahn, 472 F.2d 272 [2d Cir, 1973], United States v. Mayersohn, 452 F.2d 521 [2d Cir, 1971], United States v. Polisi, 416 F.2d 573 [2d Cir. 1969].

Speaking of "Brady" requests in the recent case of United States v. Linda Agurs, 75-491, 19 CRL [1976, June 24], the Supreme Court said:

> "If the subject matter of such request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require

> the prosectution to respond either by furnishing information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Supra, at 3161.

The government's conduct in, at first, refusing to disclose the witness' address and in advising the witness that she would not be subpoenaed by the government, and that she did not have to appear until she had been subpoenaed, thereby affording her an opportunity to disappear, deprived the appellant of his Sixth Amendment right to present a defense. By failing to meet its "Brady" duty the government deprived the appellant of a fair trial. A new trial, at which the appellant would have the opportunity of interviewing and calling this witness, should be ordered.

C. ON THREE OCCASIONS, THE APPELLANT WAS SEEN IN MANACLES BY MEMBERS OF THE JURY

Members of the jury saw the appellant defendant, CHARLES RAMSEY, in manacles on three separate occasions, as he was heing led through the courthouse by United States Deputy Marshals. Although prejudice which may arise from such encounters is not necessarily as grave as that where a defendant is manacled throughout the trial, or garbed in prison clothes, it ignores reality to presume that such meetings are always harmless. United States v. Torres, 519 F.2d 723, 727 [2d Cir. 1975], Kennedy v.

Cardwell, 487 F.2d 101, 109 [6th Cir. 1973], Cert. den'd. 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed. 2d 0 [1976].

In Torres, supra, at 727 and 728, this Court found that the prejudice which might have been caused by a single chance encounter such as this, had been cured by the trial court's prompt holding of a voir dire examination of the juror who saw the defendant and by its decision to excuse an alternate juror who said that the view might affect her judgment.

In the instant case, the trial court did not hold any voir dire but relied seoley upon the United States attorney's statement that he interviewed a witness outside the presence of the defense counsel and thqt that witness, although not a juror, saw absolutely nothing.

The four defendants who were viewed in manacles, CHARLES RAMSEY, defendant-appellant, Dog Turner, derendant-appellant, Al Taylor, defendant-appellant, and Basil Hansen, defendant-appellant, all of whom were incarcerated from the very inception of this trial, were found guilty.

The instruction by the Court cannot have cured the prejudice caused by these repeated viewings. In a transcript of over 4300 pages, the direct testimony and cross-examination relating to CHARLES RAMSEY does not exceed 47 pages. At least half of this related to the very dubious testimony of two government witnesses relating to an alleged transaction that is said to have occurred in 1971. In these circumstances,

it cannot be said that the repeated sight of RAMSEY in manacles, and under escort, did not lead the jury to conclude that he was an obviously dangerous individual and to resolve their doubts concerning the testimony offered against the innocence of the appellant. If one considers, further, that the appellant was deprived of an opportunity to call and interview a potentially favorable witness by the prosecution's misconduct, one must conclude that fundamental concepts of fairness require that the appellant's guilt or innocence be determined at a new trial.

POINT II

PRIVATE CONVERSATIONS BETWEEN JUDGE AND JURORS DURING DELIBERATIONS DENIED DEFENDANT A FAIR AND IMPARTIAL TRIAL

On numerous occasions, during the five (5) days of jury deliberation, the Court spoke privately with juror number 3, Mr. Allen.

These conversations were held outside the presence of the defendants, their counsel and the United States Attorney. These conversations were never consented to by either the defense or the government.

On April 1, 1976, at the request of the government and defense counsel, the Court made an in camera record of what transpired twelve (12) hours earlier during the night of March 31, 1976 between Judge Duffy and juror Allen.

This was recorded by the Court, alone without the presence of the juror, and ordered sealed.

Again, on April 2, 1976 the Court spoke privately with another juror, Mrs. Moses [J 188]. This conversation was related subsequently in open court, again outside the presence of that juror, Mrs. Moses. An exception was taken.

An hour and twenty minutes later the jury terminated its five days of deliberations and returned its verdict of guilt.

It should be noted that juror number 3, Mr. Allen, qualified his service as a juror by advising the Court during his selection that he had a medical appointment in mid-March.

The majority of cases holds that it is error, absent a showing of lack of prejudice, for the Court to communicate with the jury in the absence of counsel. United States v. Reynolds, 489 F.2d 4 [CCA Mich. 1933]; United States v. Marken, 457 F.2d 186 [CACal.1970]; Rice v. United States, 356 F.2d 709 [CA Minn. 1966]; Dodge v. United States, 258 F 300, Cert. den'd. 40 S.Ct. 10, 250 U.S. 660, 63 L.Ed. 1194 [CA NY 1919]. The minority of the cases hold that the error is not reversible absent a showing of clear prejudice. United States v. Freed, 460 F.2d 75 [CA Colo. 1970]; United States v. Woodner, 317 F. 2d 649 [2d Cir. 1963] Cert. den'd. 84 S.Ct. 192, 375 U.S. 903.

Rule 43, Fed. R. Crim. P., explicitly states that "the defendant shall be present....at every stage of the trial."

Given the knowledge available to him, the appellant can only state that it was error for the Court to converse privately with two jurors during the jury's deliberations. Whether the error was harmless, harmful or plain with the meaning of Rule 52, Fed. R. Crim. P., can only be determined after the sealed record has been reviewed. The appellant therefore asks this Court to review the record of these conversations and for an opportunity to argue the merits of the possible prejudice of these conversations and further direct a hearing with the juror as to what was said by him.

Pursuant to the Federal Rules of Appellate Procedure, all relevant arguments in the briefs filed by the co-appellants are incorporated by reference.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT BELOW MUST BE REVERSED AND THE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL BE GRANTED.

Respectfully submitted,

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